IN THE

Supreme Court of the United States

October Term 1974
No. 73-1995

ALLEN F. BREED,

Petitioner,

vs.

GARY STEVEN JONES,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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The petitioner Allen F. Breed, Director of the California Youth Authority, respectfully prays that a writ of certiorari issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 15, 1974.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in Appendix A to this petition. The opinion rendered by the United States District Court for the Central District of California is reported as *Jones v. Breed*, 343 F. Supp. 690 (C.D. Cal. 1972). The prior opinion of the California Court of Appeal disposing of respondent Jones' identical claim on state habeas corpus is reported as *In re Gary Steven J.*, 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (1971), *hrg. denied* by California Supreme Court on August 4, 1971.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 15, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Was respondent Gary Steven Jones placed twice in jeopardy when the California juvenile court, after a finding of delinquency and upon determining that this minor was unfit for treatment as a juvenile, waived jurisdiction and directed the district attorney to file criminal charges in adult court?

Statutory Provisions Involved

The four provisions of the California Juvenile Court Law pertinent to this case are set forth verbatim as footnotes in the Statement of the Case which follows.

Statement of the Case

On February 9, 1971, a petition was filed in the Juvenile Court of Los Angeles County Superior Court alleging that respondent Gary Steven Jones was a person described by section 602 of the Welfare and Institutions Code,[1] in that he had committed an act which,

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[1]Unless otherwise indicated, all further references to California statutes will be to the California Welfare and Institutions Code. As of the date of filing of the petition in this case, section 602 provided:

> "Any *person* under the age of *21* years *who* violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime or who, after having been found by the juvenile court to be a person described by Section 601, fails to obey any lawful order of the juvenile court, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court." (Emphasis added.)

An amendment in 1971 lowered the jurisdiction age from 21 to 18. A 1972 amendment added "who is" after "person" and substituted "when he" for "who" before "violates."

if committed by an adult, would constitute a violation of California Penal Code section 211 (robbery). A detention hearing was held, and respondent was detained pending a hearing on the petition. [*See* Exhs. D and E to Dist. Ct. Petn., Record, pp. 19-20.]

On March 1, 1971, a "jurisdictional hearing" was held pursuant to section 701.[2] At the conclusion of this hearing, the juvenile court found that the allegations of the petition were true and that respondent was a person described by section 602. The proceedings

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[2]Section 701 provides:

> "At the hearing, the court shall first consider only the question whether the minor is a person described by Sections 600, 601, or 602, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, *proof beyond a reasonable doubt* supported by evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Section 600 or 601. When it appears that the minor has made an extrajudicial admission or confession and denies the same at the hearing, the court may continue the hearing for not to exceed seven days to enable the probation officer to subpoena witnesses to attend the hearing to prove the allegations of the petition. If the minor is not represented by counsel at the hearing, it shall be deemed that objections that could have been made to the evidence were made." (Emphasis added).

A 1971 amendment effective subsequent to respondent's jurisdictional hearing, substituted "proof beyond a reasonable doubt" as above for "a preponderance of evidence." Respondent Jones, however, has made no claim in the courts below that the standard of proof failed to satisfy due process under *In re Winship*, 397 U.S. 358 (1972).

were continued for a dispositional hearing pursuant to section 702.[3] [Record, p. 21.]

After a hearing held on March 15 and 22, 1971, the juvenile court found, pursuant to section 707,[4] that

[3]Section 702 provides:

"After hearing such evidence, the court shall make a finding, noted in the minutes of the court, whether or not the minor is a person described by Sections 600, 601, or 602. If it finds that the minor is not such a person, it shall order that the petition be dismissed and the minor be discharged from any detention or restriction theretofore ordered. If the court finds that the minor is such a person, it shall make and enter its findings and order accordingly and shall then proceed to hear evidence on the question of the proper disposition to be made of the minor. Prior to doing so, it may continue the hearing, if necessary, to receive the social study of the probation officer or to receive other evidence on its own motion or the motion of a parent or guardian for not to exceed 10 judicial days if the minor is detained during such continuance, and if the minor is not detained, it may continue the hearing to a date not later than 30 days after the date of filing of the petition. The court may, for good cause shown continue the hearing for an additional 15 days, if the minor is not detained. The court may make such order for detention of the minor or his release from detention, during the period of the continuance, as is appropriate."

This section has not been amended since the date of respondent's hearing.

[4]Section 707 provides today, as it provided at the time of respondent's hearing, as follows:

"At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, or if, at any time after such hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefor by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to Section 780 or 1737.1, the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the other court proceedings resume.

"In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"A denial by the person on whose behalf the petition is brought of any or all of the facts or conclusions set forth therein or of any inference to be drawn therefrom is not, of itself, sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"The court shall cause the probation officer to investigate and submit a report on the behavioral patterns of the person being considered for unfitness."

respondent was not a fit subject for treatment as a juvenile and ordered that respondent be turned over to the sheriff and district attorney for prosecution as an adult. [Exh. F to Dist. Ct. Petn., Record, p. 38.] The juvenile court based its finding of unfitness on the fact that respondent had been involved in no fewer than three armed robberies. [*Id.*] The matter was set over one month for a nonappearance report as to the progress of the adult action. [*Id.*]

On April 1, 1971, the juvenile court denied a petition for state writ of habeas corpus filed on behalf of this respondent. This petition raised the same double jeopardy issue raised in respondent's petition for writ of habeas corpus in federal district court. [Exhs. G and H to Dist. Ct. Petn., Record, pp. 43-65.] Thereafter respondent sought habeas corpus relief in the California Court of Appeal, Second Appellate District, Division Four. Although that court initially stayed the

pending criminal prosecution of respondent, it ultimately rejected his double jeopardy claim in a published opinion. *In re Gary Steven J.*, 17 Cal. App. 3d 704, 95 Cal. Rptr. 185 (1971). On August 4, 1971, the California Supreme Court denied this respondent's petition for hearing with respect to the Court of Appeal decision. [Exh. I to Dist. Ct. Petn., Record, p. 66.]

Subsequently respondent was held to answer after a preliminary hearing on the robbery charge. Thereafter an information charging one count of robbery in violation of California Penal Code section 211 was filed in the California superior court. Respondent Gary Steven Jones pleaded not guilty and submitted his case to the court, without a jury, on the transcript of the preliminary hearing. The court found respondent guilty as charged and ordered him committed to the California Youth Authority where he is currently in constructive custody on parole. [See Exhs. J-N to Dist. Ct. Petn., Record, pp. 67-84.] No appeal was taken from that judgment of conviction.

On December 10, 1971, respondent Gary Steven Jones, through his mother as guardian *ad litem*, filed the instant petition for writ of habeas corpus in the District Court. [Record, p. 2.] After receiving a response on behalf of the California Youth Authority and after hearing argument from both parties, the District Court denied the petition for writ of habeas corpus in an order filed May 5, 1972. *Jones v. Breed*, 343 F. Supp. 690 (C.D. Cal. 1972).

Respondent filed a timely notice of appeal. [Record, p. 157.] On June 21, 1972, the District Court denied respondent's application for a certificate of probable cause.

On August 31, 1972, Chief Judge Chambers of the Ninth Circuit granted respondent's application for a certificate of probable cause and his motion to appeal *in forma pauperis*.

On May 15, 1974, the Ninth Circuit reversed the judgment of the District Court "with directions for the District Court to issue a writ of habeas corpus directing the state court, within 60 days, to vacate the adult conviction of Jones and either set him free or remand him to the juvenile court for disposition."

On June 18, 1974, Judge Wallace of the Ninth Circuit granted a stay of the mandate of that court under Rule 41(a) of the Federal Rules of Appellate Procedure pending the filing, consideration and disposition by this Court of the instant petition for writ of certiorari, provided such petition was filed in the Clerk's Office of this Court on or before July 5, 1974. This petition has been filed prior to that date. The stay order further provides that, in the event the petition for writ of certiorari is granted, this stay is to continue pending the final disposition of the case by this Court.

In this case, the jurisdiction of the district court was invoked pursuant to the federal habeas corpus statutes, 28 U.S.C. §§ 2241 and 2254. The double jeopardy issue presented by this petition was the only issue raised and considered by the district court and the Court of Appeals for the Ninth Circuit.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I

This Case Presents a Novel and Important Question of Whether Double Jeopardy Bars the Adult Trial of a Delinquent Juvenile Found Not to Be Amenable to Treatment Through the Facilities of the Juvenile Court

In this case, after a finding of delinquency at a jurisdictional hearing, the California juvenile court found respondent Jones unfit for treatment as a juvenile because he had committed three armed robberies. Thereafter respondent Jones was convicted of armed robbery in adult criminal proceedings.

On habeas corpus, the California courts and the federal district court found no violation of the prohibition against double jeopardy because no new jeopardy was involved when respondent stood trial as an adult. The Court of Appeals for the Ninth Circuit reversed the judgment of the district court and ordered the issuance of a writ of habeas corpus. The Ninth Circuit held that once jeopardy had attached at the adjudicatory or jurisdictional hearing in juvenile court, the minor could not be retried as an adult or as a juvenile absent some exception to the Fifth Amendment guarantee against double jeopardy made applicable to the States through the due process clause of the Fourteenth Amendment. *See Benton v. Maryland,* 395 U.S. 784 (1969). Petitioner submits that this holding presents an important constitutional issue which this Court should grant certiorari to decide.

At least 44 American jurisdictions have provisions in their juvenile court statutes which permit waiver of jurisdiction over certain juveniles found unfit for treat-

ment in the facilities available to the juvenile court. *See* Rudstein, *Double Jeopardy in Juvenile Proceedings,* 14 Stan. L. Rev. 266, 297, n.128 (1972). Of these jurisdictions, 33 states either make no mention of when transfer to the criminal courts can occur or expressly permit transfer after an adjudication of delinquency has begun. (*Id.* at 299-300 nn. 134-37.) Six states, including the populous states of California and Pennsylvania, permit the juvenile court to waive jurisdiction after a finding of delinquency.[5] (*Id.* at 300 n. 136.) Only 11 jurisdictions provide that when a waiver hearing is held, it must occur prior to a hearing on the merits of the delinquency petition.[6] (*Id.* at 299 n. 134.)

In addition to the large number of jurisdictions which will be affected if the Ninth Circuit's application of the double jeopardy clause to transfer proceedings, this Court must also consider the retroactive nature of such a double jeopardy rule in appraising the importance of the question raised by this petition. In *Ashe v. Swenson,* 397 U.S. 436, 438, n.1 (1970), this Court stated that *Benton v. Maryland, supra,* was retroactive in its application of double jeopardy to the states. Retroactive application of the Ninth Circuit's decision to California alone would result in the release

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[5]Conceptually, under the double jeopardy clause, it makes no difference whether the transfer takes place before or after the finding of delinquency. Assuming that jeopardy attaches when the first witness is sworn at a combined adjudicatory and transfer hearing, a new trial in adult court would be a second jeopardy unless one concludes that no new jeopardy arises or that the transfer is an exception to the double jeopardy prohibition.

[6]Obviously a decision to waive jurisdiction made prior to an adjudicatory hearing would not involve double jeopardy because the transfer hearing would then be akin to a preliminary hearing. In *Collins v. Loisel,* 262 U.S. 426 (1923), this Court held that jeopardy does not attach at a preliminary hearing.

of a large number of dangerous felons. Taking the period from 1969 through 1971 alone, it is readily apparent from the following table that a substantial number of prisoners may be eligible for outright release:[7]

PERSONS UNDER THE AGE OF 21 COMMITTED TO CALIFORNIA PRISONS DURING THE YEARS 1969-1971

Offense	Age at Date of Commitment					
	15	16	17	18	19	20
First degree murder	0	0	4	19	19	20
Second degree murder	0	0	4	9	15	24
Manslaughter	0	0	0	2	12	17
First degree robbery	0	0	1	25	87	175
Second degree robbery	0	0	0	5	16	51
Assault with a deadly weapon	0	0	2	2	15	31
Assault on peace officer	0	0	0	0	7	10
Forcible rape	0	0	1	6	14	23
First degree burglary	0	0	0	2	7	18
Second degree burglary	1	0	0	6	28	55
Grand theft	0	0	0	0	4	19
Receiving stolen property	0	0	0	1	5	15
Auto theft	0	0	0	2	15	19
Sale of narcotics	0	0	0	0	4	10
Sale of dangerous drugs	0	0	0	1	6	20
Escape	0	0	0	1	8	30
Weapons Laws	0	0	0	1	1	6
Kidnapping	0	0	1	2	7	5
Arson	0	0	0	0	1	2
All other felonies	0	0	0	8	32	76
TOTAL	1	0	13	92	303	626
				GRAND TOTAL:		1035

[7]These figures have been complied by the Bureau of Criminal Statistics of the California Department of Justice. Although no figures are presently available as to how many of these persons are still in prison or on parole, one would expect a high percentage of these persons still to be in custody because most of the crimes enumerated carry lengthy maximum sentences. For example, the crimes of murder, robbery, and assault with a deadly weapon are punishable by a maximum of life imprisonment in California. With respect to these figures, it is presumed that all of these juveniles transferred to adult court with a fitness hearing which preceded an adjudicatory hearing on the delinquency petition filed in juvenile court. California law did not provide for such a preliminary fitness hearing at that time.

In view of the probable impact of the Ninth Circuit rule, it is important that this Court consider whether double jeopardy must operate to bar the adult trial of a juvenile who is found unfit for treatment as a juvenile at or after a hearing on the issue of delinquency. This Court has stated that the Fifth Amendment guarantee against double jeopardy furthers three separate constitutional policies: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

The first and third of these policies are inapplicable here because neither an acquittal nor multiple punishment for the same offense is involved. If any of these policies is applicable to the transfer situation, it would be the second one which protects against a second prosecution for the same offense after conviction. In reality, however, this second policy of double jeopardy appears to be just an aspect of the protection against multiple punishment: a second prosecution is barred after one conviction because it creates the risk of a second sentence for the same offense. When a juvenile court waives jurisdiction and orders a minor prosecuted as an adult, there is no risk of a second "sentence" for the same offense. Although the finding of delinquency in juvenile court may be analogized to a criminal conviction for some purposes, all of the proceedings—both juvenile and adult—can only result in a single disposition when there is a waiver of juvenile court jurisdiction. That disposition is a single criminal sentence for a single criminal offense.

The California courts and the federal district court found that no new jeopardy was created by the transfer of respondent Jones from juvenile court to adult court. *In re Gary Steven J.*, 17 Cal. App. 3d 704, 710, 95 Cal. Rptr. 185 (1971); *Jones v. Breed*, 343 F. Supp. 690, 692 (C.D. Cal. 1972). *See also Bryan v. Superior Court*, 7 Cal. 3d 575, 580-84, 102 Cal. Rptr. 831, 498 P.2d 1079 (1972). This Court has recognized that "a concept of continuing jeopardy . . . has application where criminal proceedings against an accused have not run their full course." *Price v. Georgia*, 398 U.S. 323, 326 (1970). Although the court below would narrowly confine that concept to retrials which follow appellate reversals of criminal convictions, this Court has never intimated that continuing jeopardy is limited to that context.

It should be observed that juvenile court transfer proceedings do not permit the State ". . . to make repeated attempts to convict an individual for an alleged offense," a practice which this Court disapproved in *Green v. United States*, 355 U.S. 184, 187-88 (1957). The apparent purpose of the transfer procedures enacted in California and other jurisdictions is to see that the juvenile is accorded the full panoply of criminal trial rights before he may be sentenced to state prison. Those rights are not yet fully applicable to juvenile delinquency proceedings. As Mr. Justice Blackmun has written in *McKeiver v. Pennsylvania*, 403 U.S. 528, 533 (1971), "This Court, however, has not said that *all* rights constitutionally assured to an adult accused of crime also are to be enforced or made available to the juvenile in his delinquency proceedings." (Emphasis in original.) The further equation of juvenile and adult court proceedings may ultimately lead some states to adopt criminal sentencing as one of the dispositional alternatives available to the juvenile court judge.

In its opinion, the Ninth Circuit asserts that "applying double jeopardy protection to juvenile proceedings will not impede the juvenile courts in carrying out their basic goal of rehabilitating the erring youth." (Slip Opinion, p. 7.) In reality, it further engrafts the criminal trial model onto the specialized structure of the juvenile court system. To avoid the bar of double jeopardy when seeking to remand a juvenile for trial as an adult, states such as California must adopt a preliminary hearing procedure in juvenile court to determine at the outset whether the minor is amenable to treatment as a juvenile or whether he should be tried as an adult. Such a procedure is reminiscent of the command of the Red Queen in Lewis Carroll's *Alice in Wonderland:* "Sentence first—verdict afterward." A preliminary fitness hearing would require the juvenile court judge to focus on disposition considerations before there has been an adjudicatory hearing on jurisdiction ("guilt"). The California Supreme Court has pointed out the basic unfairness of this approach in holding that the juvenile court commits reversible error by reviewing the probation officer's social study report on disposition before the determination of the issue of jurisdiction. The Court stated:

> "The history of [California] Welfare and Institutions Code sections 701, 702, and 706 clearly indicates that the Legislature intended to create a bifurcated juvenile court procedure in which the court would first determine whether the facts of

the case would support the jurisdiction of the court in declaring a wardship and *thereafter* would consider the social study report at a hearing on the appropriate disposition of the ward. This procedure affords a necessary protection against the premature resolution of the jurisdictional issue on the basis of legally incompetent material in the social report." *In re Gladys R.*, 1 Cal. 3d 855, 859-60, 83 Cal. Rptr. 671, 674-75, 464 P.2d 127, 130-31 (1970) (brackets added; footnotes omitted).

The purpose of requiring separate considerations of wardship and of disposition was to prevent the court from being affected, at the first stage, by evidence of the minor's character not relevant to determination of his guilt. *In re Gary Steven J.*, 17 Cal. App. 3d 704, 708, 95 Cal. Rptr. 185, 188 (1971).

It thus becomes evident that the Ninth Circuit's decision in this case does not require California to add a just minor additional step to its juvenile court procedures. The preliminary fitness or waiver hearing mandated by the Ninth Circuit must be a costly and duplicative full-blown trial bearing no resemblance to the preliminary hearings held in the criminal courts. Under California law, the nature of the crime allegedly committed, the circumstances and details surrounding its commission, and the minor's degree of sophistication in relation to criminal activities are factors which may be considered by the juvenile court in the exercise of its discretion in certifying a minor to the superior court as not amenable to treatment as a juvenile. *Jimmy H. v. Superior Court*, 3 Cal. 3d 709, 715-16, 91 Cal. Rptr. 600, 604, 478 P. 2d 32, 36 (1970). In order to preclude manifest unfairness to the juvenile facing transfer, the offense alleged in the juvenile court petition will need to be proved at the waiver hearing by some quantum of proof beyond the submission of a mere *prima facie* case. Otherwise, a child of tender years may have to stand trial in adult court because of a presumption of guilt based on a limited factual hearing. In addition, the judge who presides at the fitness hearing must be disqualified from sitting at the subsequent jurisdictional hearing if the minor is found to be amenable to treatment as a juvenile, this requirement because of the potential of prejudice at the adjudicatory hearing from this judge's having examined the materials on the minor's prior criminal history in the probation department's social study. Thus, in order to satisfy the Ninth Circuit's view of the proper interpretation of the double jeopardy clause, the juvenile courts must conduct two full trials presided over by two different judges in every case where there is a question as to the minor's amenability to treatment in the facilities available to the juvenile court.

Petitioner further submits that the Ninth Circuit decision does reflect full appreciation of the purpose served by transfer proceedings when it asserts that "Appying double jeopardy protection to juvenile proceedings will not impede the juvenile courts in carrying out their basic goal of rehabilitating the erring youth." (Slip Opinion, p. 7.) Transfer provisions, such as California Welfare and Institutions Code section 707, permit the juvenile courts to screen out the hardened juvenile offender from those minors who show a better prospect for rehabilitation. As explained by one writer:

> "At some point during the adjudication of a delinquency case it may become apparent to the

juvenile court that the minor is unlikely to benefit from the rehabilitative resources available to the court. The minor may have demonstrated by his past behavior, for example, that rehabilitation is improbable and that more severe punishment is required. He may have proven himself a threat to the proper functioning of juvenile institutions during a prior commitment, thereby requiring placement elsewhere; he may be so old that the juvenile court cannot retain jurisdiction over him for a period long enough to rehabilitate him or to punish him fully for his offense. The court may send the juvenile to the criminal court for adjudication as an adult for any of these penological reasons. . . ." Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts*, 24 Stan. L. Rev. 874, 877 (1972) (footnote omitted).

By requiring a final determination of fitness prior to the adjudicatory hearing, the Ninth Circuit rule is likely to create two pernicious effects. In close cases the juvenile court judge may opt for an adult trial rather than run the risk that a hardened offender not amenable to treatment must be retained in a juvenile facility where his attitude and example may adversely affect the rehabilitation of other youths. In other cases, the true character of the juvenile may not be apparent at the outset of proceedings. In these cases, the more serious offender must be kept in one of the treatment facilities available to the juvenile court where he may be able to corrupt other youths and disrupt efforts directed toward the rehabilitation of others.

A third additional effect of the Ninth Circuit rule will be in the windfall bestowed upon a large number

of dangerous felons who were certified for trial as adults at a time when juvenile court proceedings were thought to be "civil proceedings" and who were given the benefit of an adult trial, not as a repeated attempt to obtain a conviction, but in order to give them the greater protections accorded in adult criminal proceedings. In *McKeiver v. Pennsylvania, supra,* 403 U.S. at 551, this Court observed:

> "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day but for the moment we are disinclined to give impetus to it."

The application of double jeopardy to bar adult trials for minors over whom the juvenile court has waived jurisdiction clearly decreases its flexibility. If it is unable to fulfill the rehabilitative ideal because of an inability to remove disruptive or depraved individuals from its programs, a promising experiment may come to an end. It would indeed be anomalous if the application of double jeopardy to waiver proceedings were to occasion this result. At common law, there were no juvenile courts, and hence there was no analogue to the *sui generis* proceedings here involved. Therefore, it cannot be said that the framers of the Bill of Rights ever intended double jeopardy to apply to this unique feature of the juvenile court structure.

While the Ninth Circuit notes that there is authority indicating that the preferred practice is to hold a fitness hearing prior to any determination of delinquency (Slip Opinion, p. 9), this preference appears to be based on the cautious assumption that such a practice

is necessary to avoid potential application of double jeopardy to transfers of juveniles to adult courts for trial. The fact remains, however, that 33 states permit transfer after an adjudication of delinquency has begun. Although the widespread extent of a practice is not conclusive as whether that practice accords with due process, this Court has held that it is plainly worth considering in determining whether the practice offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Leland v. Oregon,* 343 U.S. 790, 798 (1952). Petitioner submits that the extent of the practice involved here and its importance to the proper functioning of the Nation's juvenile courts make this case appropriate for certiorari.

II

This Court Should Grant Certiorari to Resolve a Conflict Between the Circuits

In holding that double jeopardy barred respondent's trial as an adult, the Ninth Circuit rejected the clear precedent of a prior District of Columbia Circuit decision to the contrary. In *United States v. Dickerson,* 271 F. 2d 487, 491 (D.C. Cir. 1959), the Court of Appeal held that the "full investigation" required by the District of Columbia juvenile court laws prior to a waiver of jurisdiction contemplated at the very least an informal hearing into the allegations of the petition. The court concluded:

> ". . . it was not improper for the Juvenile Court to conduct a hearing before determining whether or not to waive jurisdiction. To hold that jeopardy attached at that point would preclude the full and informal investigation in the interests of the minor and the community which Congress thought necessary to achieve the salutary remedial purposes of a juvenile court system." (*Id.* at 491-82.)

The *Dickerson* case is indistinguishable from the instant case. In *Dickerson,* the juvenile admitted the conduct alleged in the delinquency petition, and the juvenile court found him to be within its jurisdiction of a delinquent child. Thereafter the juvenile court waived jurisdiction to the district court for trial. (*Id.* at 489-90.) The minor involved was indicted for robbery, but the district court dismissed indictment on the ground that double jeopardy had attached in the juvenile court proceedings. *United States v. Dickerson,* 168 F. Supp. 899, 900-03 (D.D.C., 1958). From these facts, it is clear that the Court of Appeals decision in *Dickerson* is in square conflict with the Ninth Circuit's decision in this case. The opinion of the Ninth Circuit acknowledges the conflict by stating:

> "We recognize there is dicta to the contrary in *United States v. Dickerson,* 271 F.2d 487 (D.C. Cir. 1959), but that language has been so undercut by *Kent, Gault,* and *Winship,* that we are not persuaded that it is a correct statement of today's law." (Slip Opinion, p. 11.)

Of course, none of the decisions of this Court which purportedly undercut the holding of *Dickerson* hold that double jeopardy applies to juvenile court proceedings, much less to the waiver of jurisdiction involved here.

III

This Case Also Presents a Conflict Between the Ninth Circuit and the California Supreme Court on a Question of Federal Constitutional Law

Perhaps even more important than the conflict between the circuits as a factor which should motivate this Court to grant certiorari, is the direct conflict between the California Supreme Court and the Ninth Circuit on the question of whether double jeopardy bars an adult criminal trial where a waiver of jurisdiction occurs during or after a hearing on the merits of a juvenile delinquency petition. The California Supreme Court expressly approved the decision of the California Court of Appeal in this case, agreeing with the application of the concept of continuing jeopardy and rejecting the view that a transfer of the minor is constitutionally forbidden once legal jeopardy has attached at the jurisdictional stage of the juvenile court proceedings. *Bryan v. Superior Court,* 7 Cal. 3d 575, 580-83, 102 Cal. Rptr. 831, 834-36, 498 P.2d 1079, 1082-84 (1972), *cert. denied,* 410 U.S. 944 (1973). In this case, the Ninth Circuit has taken the opposite view.

While the California Supreme Court has indicated that the juvenile courts of this state may conduct fitness hearings prior to hearing the merits of a delinquency petition (*see Donald L. v. Superior Court,* 7 Cal. 3d 592, 598, 102 Cal. Rptr. 850, 853, 498 P. 2d 1098, 1101 (1972)), the *Bryan* decision, *supra,* makes

it clear that the failure to hold the fitness hearing before the jurisdictional hearing will not be reversible error. Moreover, it is well established in California jurisprudence that, although the California courts are bound by decisions of this Court interpreting the federal Constitution, they are not so bound by decisions of the lower federal courts even on federal questions. *See, e.g., People v. Bradley,* 1 Cal. 3d 80, 86, 81 Cal. Rptr. 457, 460, 460 P. 2d 129, 132 (1969).

Thus, the net result will be a substantial number of California criminal judgments which will be affirmed on appeal only to be set aside on federal habeas corpus under compulsion of the Ninth Circuit's decision in this case. Unless this Court grants certiorari, this Circuit may be treated to the spectacle of a federal-state conflict of massive proportions. The latest figures available indicate that the following numbers of juveniles were remanded for trials as adults during the period of 1968 through 1972: 1,018 in 1968; 797 in 1969; 914 in 1970; 894 in 1971; and 509 in 1972. Bureau of Criminal Statistics, Calif. Dept. of Justice, *Crime and Delinquency in California—1972,* p. 52, table 13. Petitioner submits that this Court should grant certiorari to forestall the deterioration of federal-state relations which might ensue if the California courts were ordered to set aside their judgments in all, or even most, of these cases.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Gary Stevens Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, *Petitioner-Appellant*, vs. Allen F. Breed, Director of the California Youth Authority; Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, *Respondents-Appellees*. No. 72-2644.

[May 15, 1974].

Appeal from the United States District Court for the Central District of California.

Before: GOODWIN and WALLACE, Circuit Judges, and EAST,* District Judge

WALLACE, Circuit Judge:

Seventeen-year-old Jones was apprehended for robbery, detained and adjudicated a ward of the juvenile court. Subsequently, he was referred for trial as an adult and was convicted. Having exhausted his state remedies, he unsuccessfully applied to the district court for habeas corpus relief, claiming a violation of his Fifth Amendment right against double jeopardy. We reverse.

California does not challenge the use of habeas corpus as a proper remedy in this case, *see Fain v. Duff*, 488 F.2d 218 (5th Cir. 1973), or contend that Jones has not exhausted his state remedies. The sole question before us is whether jeopardy attached during

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*Honorable William G. East, Senior United States District Judge, Eugene, Oregon, sitting by designation.

the juvenile court proceedings to prevent Jones' trial as an adult.

The State of California filed a petition in the juvenile court alleging that Jones, a minor, had committed an act which, if committed by an adult, would be a violation of Cal. Penal Code § 211 (robbery). If the allegations in the petition were true, the juvenile court had jurisdiction pursuant to Cal. Welf. & Inst'ns Code § 602.[1] The juvenile court, following a preliminary hearing, ordered that Jones be detained pending a hearing on the delinquency petition.

Twenty days later, the juvenile court held the delinquency hearing[2] for the purpose of determining whether Jones had committed the crime alleged, whether the juvenile court had jurisdiction and whether Jones would be adjudged a ward of the court.[3] Thus, for the juvenile court to proceed, the state had to prove that Jones committed the robbery. With the exception of a right to a jury trial, the delinquency hearing is in the nature of a criminal trial. *See In re Winship*, 397

[1]Cal. Welf. & Inst'ns Code § 602 provides in part:

> Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime . . . is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

[2]Cal. Welf. & Inst'ns Code § 701 provides in part:

> At the hearing, the court shall first consider only the question whether the minor is a person described by Sections 600, 601, or 602, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, proof beyond a reasonable doubt supported by evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602. . . .

[3]See note 1, *supra*.

U.S. 358, 365-66 (1970); *In re Gault*, 387 U.S. 1, 49-51 (1967). Jones and two prosecution witnesses testified at the hearing. The juvenile court found that Jones had committed the robbery and that Jones was under the jurisdiction of the juvenile court and continued the proceedings to a later date at which time the court would determine the proper disposition of Jones.[4] At the subsequent hearing, the juvenile court judge announced he did not intend to proceed with Jones as a juvenile but intended to find him unamenable to the rehabilitative facilities of the juvenile court and to direct the District Attorney to prosecute Jones as an adult.[5] Upon an objection by Jones that he had

[4]Cal. Welf. & Inst'ns Code § 702 provides in part:

> After hearing such evidence, the court shall make a finding, noted in the minutes of the court, whether or not the minor is a person described by Section 600, 601, or 602. If it finds that the minor is not such a person, it shall order that the petition be dismissed and the minor be discharged from any detention or restriction theretofore ordered. If the court finds that the minor is such a person, it shall make and enter its findings and order accordingly and shall then proceed to hear evidence on the question of the proper disposition to be made of the minor. Prior to doing so, it may continue the hearing, if necessary, to receive the social study of the probation officer or to receive other evidence on its own motion or the motion of a parent or guardian for not to exceed 10 judicial days if the minor is detained during such continuance. . . .

[5]Cal. Welf. & Inst'ns Code § 707 provides in part:

> At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, . . . the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall di-

(This footnote is continued on next page)

assumed the hearing was to determine disposition to the appropriate juvenile facility, not to determine certification to the adult court for criminal prosecution, the court granted a one-week continuance. At the next hearing, Jones objected to the certification, contending, among other things, that he had already been adjudicated a person described in Cal. Welf. & Inst'ns Code § 602[6] by the juvenile court and, therefore, certification to be "tried" again would place him twice in jeopardy. The court rejected the argument and certified Jones to be tried as an adult.

Following an unsuccessful attempt to secure habeas corpus relief in the state courts, Jones was tried and found guilty of armed robbery and his double jeopardy argument was again rejected.

Undaunted, Jones filed a petition for habeas corpus in the district court, once more claiming double jeopardy. The district court judge denied the petition, holding that jeopardy does not attach in the juvenile proceedings and even if it had, no new jeopardy arose by the procedure of certifying Jones to be tried and ultimately convicted as an adult. *Jones v. Breed*, 343 F. Supp. 690 (C.D. Cal. 1972).

We must first resolve whether the protection of the Fifth Amendment "nor shall any person be subject for the same offense to be twice put in jeopardy of life

rect the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the other court proceedings resume.

[6]See note 1, *supra*.

or limb . . . ." applies to juvenile court proceedings.[7] Certainly the constitutional mandate makes no distinction between adults and juveniles. *See In re Gault*, 387 U.S. 1, 13 (1967). The district court found that the nature of the juvenile court proceeding is such that it should be treated differently from adult criminal proceedings and double jeopardy restrictions should not be applied.

The juvenile court system was conceived around the turn of the century with the emergence of the enlightened concept of separating erring children from hardened felons.[8] The primary objective of the new system was to take juvenile offenders out of adult courts and adult bastilles and provide them with a sound rehabilitation program.[9] The system was envisioned as civil in nature rather than criminal. Traditional adversarial fact-finding procedures were abandoned in favor of informal procedures that would allow the court to determine what was in the juvenile's best interest and how he could be retrained, while at a pliable age, to live

[7]The double jeopardy clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1969) (overruling Palko v. Connecticut, 302 U.S. 319 (1937)).

[8]Mennel, *Origins of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquents*, 18 Crime and Delin. 68, 69 (1972); Comment, *Constitutional Rights of Juveniles: Gault and Its Application*, 9 Wm. & Mary L. Rev. 492 (1967); Note, *Due Process and the Juvenile Offender: The Scope of In re Gault*, 14 How. L.J. 150, 151 (1968). For a very thorough history of the juvenile justice system in the United States from its meager beginning in the 1820's to the landmark enactment of the juvenile court in Illinois in 1899 (the forerunner of the modern movement), *see Fox, Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L. Rev. 1187 (1970), and Mennel, *supra*.

[9]Note, *supra* note 8, at 151; Comment, *supra* note 8, at 492.

lawfully in society.[10] The juvenile court judge, in his role as "father"[11] to the erring juvenile, was to protect his interest and welfare. Rules of evidence were abandoned and constitutional guarantees provided in adult proceedings were not afforded juveniles.[12]

Although the adoption of these informal methods was perhaps sound in principle, the complexities of our society and our overcrowded juvenile court facilities dictated some modification.[13] In *Kent v. United States*, 383 U.S. 541 (1966), the Court analyzed the procedure for referring a juvenile for trial as an adult. Recognizing the significant disparity of what could happen to the juvenile depending upon whether he was tried as a juvenile or as an adult, the Court was no longer willing to have the waiver of jurisdiction decision made without the due process requirements of a hearing, representation by counsel, a statement of reasons or considerations for any referral to the adult court and opportunity for the juvenile's counsel to review the child's social study records.

Kent was followed by *In re Gault*, 387 U.S. 1 (1967), in which the Court mandated due process protection at the delinquency hearing by requiring (1) that the juvenile be given adequate notice of the charges, (2) that he be given the right to counsel, (3) that he be allowed to assert the privilege against self-incrimination and (4) that he be given the right to confront and

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[10]Mennel, *supra* note 8, at 69; Note, *supra* note 8, at 151; Comment, *supra* note 8, at 492.

[11]Haviland, *Daddy Will Take Care of You: The Dichotomy of the Juvenile Court*, 17 Kan. L. Rev. 317, 322 (1969).

[12]*Id.*

[13]McKeiver v. Pennsylvania, 403 U.S. 528, 543-45 (1971); Comment, *supra* note 8, at 492; *see* Note, *supra* note 8, at 151.

cross-examine witnesses. More importantly, the *Gault* Court sounded a new approach to the juvenile system and rejected the theory that constitutional safeguards should be denied juveniles by the expedient of labeling the proceedings as civil when in fact they were criminal in nature. The Court reemphasized this requirement in *In re Winship*, 397 U.S. 358 (1970), holding that the charges against the juvenile must be proven at the delinquency hearing beyond a reasonable doubt. After *Winship*, if the state wished to limit constitutional rights, it inherited the burden of proving that criminal safeguards would be detrimental to particular aspects of the juvenile system.[14]

It was unclear, however, whether these constitutional safeguards[15] included the Fifth Amendment protection against double jeopardy.[16] The Supreme Court has held that not all common law protections available to adults are available to juveniles. The Constitution does not require the total emasculation of juven-

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[14]*The Supreme Court, 1969 Term*, 84 Harv. L. Rev. 1, 160 (1970).

[15]Following *Gault*, many commentators speculated on what additional constitutional safeguards would be available to juveniles. *See* Carver and White, *Constitutional Safeguards for the Juvenile Offender, Implications of Recent Supreme Court Decisions*, 14 Crime and Delin. 63 (1968); Gardner, *Gault And California*, 19 Hastings, L.J. 527 (1968); Comment, *Juvenile Court Procedures Beyond GAULT*, 32 Albany L. Rev. 126 (1967); Note, *Extending Constitutional Rights To Juveniles—Gault in Indiana*, 43 Ind. L.J. 661 (1968); Note, *The Constitution And Juvenile Delinquents*, 32 Mont. L. Rev. 307 (1971); Comment, *In Re Gault And The Persisting Questions Of Procedural Due Process And Legal Ethics In Juvenile Courts*, 47 Neb. L. Rev. 558 (1968).

[16]Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts*, 24 Stan. L. Rev. 874 (1972); Note, *Double Jeopardy and Due Process in the Juvenile Courts*, 29 U. Pitt. L. Rev. 756 (1968).

ile court procedures. As Justice Blackmun stated in *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971):

> If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it.

The basic approaches of the juvenile and adult adjudicative processes dictate that the systems not operate exactly alike. In *McKeiver*, the Court rejected the contention that a juvenile court must provide a jury trial; Justice Blackmun stated:

> If the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial.

403 U.S. at 550. But that case does not dictate the non-applicability of double jeopardy. Whether a jury is required deals with the method of juvenile adjudication; whether double jeopardy applies goes to the very core of basic application of rights and does not affect how the juvenile is tried. Its only effect on procedure pertains to whether the hearing to determine whether a minor is a fit subject for the juvenile program must be held before he is adjudicated a ward of the court. Applying double jeopardy protection to juvenile proceedings will not impede the juvenile courts in carrying out their basic goal of rehabilitating the erring youth. Indeed, basic constitutional guarantees such as that against double jeopardy are so fundamental to our notions of fairness that our refusal to find them applicable to the youth may do irreparable harm to or destroy their confidence in our judicial system. Ultimately, this may be more important than our recognition of the need for special and informal procedures to rehabilitate juveniles.

A youth is entitled to double jeopardy protection particularly when the state has elected to try him as an adult. We agree with the Fifth Circuit's statement in *Fain v. Duff*, 488 F.2d 218, 225 (5th Cir. 1973):

> Here we have a juvenile threatened with a criminal prosecution. By indicting him, the state has expressed a desire to treat him in all respects as an adult. Is there any question that since the state now proposes to subject him to the powers of the state as it would an adult, it must now accord him all the procedural rights than an adult has?

We hold that the Fifth Amendment guarantee of double jeopardy is fully applicable to juvenile court proceedings.

Having concluded that the protection against double jeopardy is among the safeguards available to a juvenile, we must decide whether jeopardy attaches during the delinquency hearing. When the juvenile court can, on the basis of the delinquency hearing, impose severe restrictions upon the juvenile's liberty, we believe jeopardy attaches. As the Fifth Circuit, when faced with a similar question in *Fain v. Duff*, 488 F.2d at 225, concluded:

> Although commitment to the Division of Youth Services may result in the juvenile being allowed to return to his home, it may also result in incarceration until age 21. Fain's commitment to the division resulted from his having been found

> delinquent. And his being found delinquent resulted from his having violated a criminal law of the State of Florida. F.S.A. §39.01(9). Thus, a violation of the criminal law may directly result in incarceration. This is a classic example of "jeopardy."

Several states have held that jeopardy attaches in the juvenile court proceeding.[17] The California Supreme Court in *Richard M. v. Superior Court*, 4 Cal. 3d 370, 482 P.2d 664 (1971), held that a second juvenile prosecution is barred where the identical delinquency petition has been dismissed in a prior juvenile court proceeding where, after a hearing on the merits, a termination similar to an acquittal has been ordered.

Although California concedes that jeopardy attaches when the juvenile is adjudicated a ward of the court, it argues that no *new* jeopardy attaches when the juvenile is referred to the adult court and subsequently convicted. It contends that the juvenile's prosecution in both the juvenile and adults courts is one continuous proceeding. To provide a legal theory for its position, California points to its own decisions contending that there is a "continuing jeopardy." *Bryan v. Superior Court*, 7 Cal.3d 575, 583, 498 P.2d 1079 (1972), *cert. denied*, 410 U.S. 944 (1973). That theory was applied by the California District Court of Appeal and by the United States District Court in this case.

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[17]*E.g., Arizona:* Anonymous v. Superior Court, 10 Ariz.App. 243, 457 P.2d 956 (1969); *Idaho:* State v. Gibbs, 94 Idaho 908, 500 P.2d 209 (1972); *Iowa:* State v. Halverson, 192 N.W. 2d 765 (Iowa 1971); *Texas:* Collins v. State, 429 S.W.2d 650 (Tex. App. 1968).

In re Gary J., 17 Cal.App.3d 704 (1971); *Jones v. Breed*, 343 F.Supp. 690, 692 (C.D. Cal. 1972).

Jones argues, on the other hand, that if the juvenile court is to certify a child to the adult court free of jeopardy, it must do so at a fitness hearing held prior to any determination of delinquency. There is no doubt that this is the preferred practice. Antieau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L. Q. 387, 397-98 (1961); *California Juvenile Court Deskbook*, § 10.4, at 148-50 (Cal. College of Trial Judges (1972)); *Model Rule for Juvenile Courts 9, National Council on Crime and Delinquency* (1969). In fact, the California Supreme Court has commended this procedure. *Donald L. v. Superior Court*, 7 Cal.3d 592, 598, 498 P.2d 1098, 1101 (1972).[18]

The question, however, is not whether it is preferable to have the fitness hearing first,[19] but whether the subsequent adult trial is a new jeopardy rather than a continuing jeopardy which both parties agree attaches at the juvenile court delinquency hearing. The theory of continuing jeopardy was implied in *United States v. Ball*, 163 U.S. 662 (1896), and enunciated by Justice Holmes in his dissent in *Kepner v. United States*, 195 U.S. 100, 134-35 (1904). In *Kepner* the Court held that to allow the prosecution to appeal from a judgment of acquittal would place a defendant in double jeopardy. Justice Holmes dissented, arguing that

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[18]The thrust of Jones' argument is that, in order to comport with the prohibition against double jeopardy, the juvenile court must waive jurisdiction in favor of the adult court prior to the delinquency hearing and not after it. Some states provide for this by statute. *E.g.*, Ga. Code Ann. § 24-A-2501; N.M. Stat. Ann. § 13-14-27.

[19]The fitness hearing procedure is described in Jimmy H. v. Superior Court, 3 Cal.3d 709, 478 P.2d 32 (1970).

"a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause." The prohibition of double jeopardy. he argued, only forbids "a trial in a new and independent case where a man already [has] been tried once." 195 U.S. at 134.

The Court has never adopted Holmes' theory,[20] but it has adopted a form of continuing jeopardy under which a person may be retried on any charges of an indictment for which he has been convicted and for which he has, upon an appeal initiated by him, had that conviction reversed. *Green v. United States,* 355 U.S. 184 (1957). If he has been acquitted, either implicitly or expressly, of any charge, he cannot be retried on that charge. *Price v. Georgia,* 398 U.S. 323 (1970). Similarly, he may not be tried for a single offense growing out of a single occurrence, criminal episode or transaction by two courts created under the authority of one state. *Waller v. Florida,* 397 U.S. 387 (1970); *Ashe v. Swenson,* 397 U.S. 436 (1970).

The principles of continuing jeopardy, as adopted by the Supreme Court, do not support California's argument that the jeopardy that attaches at the juvenile adjudicatory hearing continues through the adult

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[20] [Justice Holmes] did dissent from the holding in *Kepner*—that the Government could not appeal an acquittal—on the ground that a new trial after an appeal by the Government was part of the continuing jeopardy rather than a second jeopardy. But that contention has been consistently rejected by this Court. Green v. United States, 355 U.S. 184, 196 (1957).

trial.[21] First, the trial in adult court does not follow as a result of an appeal taken by the minor from his juvenile court conviction, but is a retrial for the same offense initiated by the state. Continuing jeopardy allows retrial following an appeal initiated by the defendant claiming error in his first conviction. If the conviction is reversed, retrial must be in the same court as the first trial. It would be in violation of the principles enunciated in *Price v. Georgia* and *Green v. United States* to allow the state to initiate a retrial after it has already obtained a conviction in juvenile court. Second, transfer following the adjudicatory hearing would essentially allow the minor to be tried for one offense in two courts created by the same state in violation of the principles enunciated in *Waller v. Florida* and *Ashe v. Swenson.* The juvenile courts are a separate court system from the adult courts and once a minor has been placed in risk of conviction he cannot be retried. Although trial in both the juvenile and the adult court may not result in separate punishment, double jeopardy protects double risk of conviction, not

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[21] As one commentator recently asserted:

> Continuing jeopardy relies on the assumption that the several trials are all based on the same complaint. In the certification situation this underlying premise is lacking. When the juvenile court judge enters a finding of nonamenability, the juvenile petition is dismissed; subsequent criminal action is based on a new complaint alleging the same facts. Even under Holmes's formulation this would not be continuing jeopardy since each prosecution proceeds under the authority of a different complaint.

Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts,* 24 Stan. L. Rev. 874, 888 (1972) (footnotes omitted).

just double risk of punishment. *Price v. Georgia,* 398 U.S. at 331. Rather than supporting California's approach, the principles of continuing jeopardy dictate that once jeopardy has attached to a minor in a juvenile court delinquency hearing, he may not be placed in peril of conviction in an adult court for charges based on any occurrence, criminal episode or transaction used as the basis for the petition in the juvenile court.

The Fifth Circuit in *Fain v. Duff,* 488 F.2d 218 (5th Cir. 1973), reached this same conclusion. Fain was arrested for rape and adjudged a delinquent by a juvenile court. Subsequently, a grand jury indicted him for the same offense. Habeas corpus issued from the district court based upon former jeopardy and the circuit court affirmed. We detect no reason to distinguish *Fain* from our case and are disposed to adopt its reasoning. We recognize there is dicta to the contrary in *United States v. Dickerson,* 271 F.2d 487 (D.C. Cir. 1959), but that language has been so undercut by *Kent, Gault* and *Winship,* that we are not persuaded that it is a correct statement of today's law.

There are basic issues of fairness upon which we should comment. Nowhere in our criminal system do we allow the prosecution to review in advance the accused's defense and, as here, hear him testify about the crime charged. The most heinous and despicable criminal is saved from such an invasion of his fundamental rights. Yet, if we adopt California's position, we approve having such a procedure applied to those of tender years. This offends our concepts of basic, even-handed fairness.

We hold that once jeopardy attaches at the adjudicatory or jurisdictional hearing in the juvenile court (here held pursuant to Cal. Welf. & Inst'ns Code § 602), the minor may not be retried as an adult or a juvenile absent some exception to the double jeopardy prohibition. There was none here. We cannot allow this fundamental constitutional right to be wrenched from the minor under the guise of providing a system for his protection.

We reverse with directions for the district court to issue a writ of habeas corpus directing the state court, within 60 days, to vacate the adult conviction of Jones and either set him free or remand him to the juvenile court for disposition.

APPENDIX B.

Gary Steven Jones, a minor, by and through Lola Mae Jones, his guardian ad litem, Petitioner, v. Allen F. Breed, Director of the California Youth Authority, Robert McKibben, Superintendent of the Southern Regional Center Clinic, California Youth Authority, Respondents. No. 71-2907-LTL.

343 F.Supp. 690 (C.D. Cal., May 5, 1972).

MEMORANDUM AND ORDER

LYDICK, District Judge.

This matter is before the Court on a Petition for Writ of Habeas Corpus filed on behalf of minor Gary Steven Jones, a prisoner of the State of California committed to the California Youth Authority after his conviction under California law of robbery in the first degree.

The Court has considered the arguments and has reviewed the Petition, the response, the reply and the authorities cited by both parties as well as the complete record of all state court proceedings.

The sole issue before this Court is whether Jones has been placed twice in jeopardy in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution by reason of his subjection to those procedures of the Welfare and Institutions Code of the State of California, known otherwise as the Juvenile Court Law, establishing a special treatment for suspected juvenile offenders.[1]

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[1]California Welfare and Institutions Code, Sections 602, 701, 702 and 707.

The question here presented has been previously considered at each stage of the proceedings before the involved state courts and duly submitted to the Court of Appeal, Second District, and Supreme Court of the State of California, on habeas corpus.[2]

Briefly stated, the facts are that on February 9, 1971 a petition was filed with the juvenile court in Los Angeles, alleging that Jones was a person described by Section 602 of the Welfare and Institutions Code in that he had committed an act which, if committed by an adult, would constitute a violation of Section 211 of the Penal Code of the State of California (robbery). After a detention hearing, the minor was detained pending a hearing on the petition. A second hearing, pursuant to Section 701 of the Welfare and Institutions Code, was held on March 1, 1971 and resulted in a finding that the allegations of the petition were true and that the minor was a person described by Section 602. The proceedings were continued for dispositional hearing pursuant to Section 702. At that hearing, the Court announced its intention to find, pursuant to Section 707, that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court and that the court intended under that section to dismiss the petition and direct that the minor be prosecuted as an adult in the Superior Court. After an adjournment, sought by the minor's counsel, such an order was made. Jones was thereafter prosecuted as an adult in the Superior Court and convicted as above noted.

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[2]In Re J., 17 Cal.App.3d 704, 95 Cal. Rptr. 185 (1971); Cert. denied by California Supreme Court August 4, 1971.

It is the second hearing before the juvenile court under Section 701 on which this Court has been asked by petitioner to focus its attention and to find that such hearing was tantamount to a criminal trial wherein jeopardy attached at its commencement thus foreclosing any later criminal prosecution.

Such finding cannot be made. That hearing was but one step in a comprehensive program developed by the State of California for the handling of delinquent youth. That program, representing the combined efforts of the California legislature and judiciary, is a thoughtful and in this Court's view entirely constitutional effort to strike a realistic balance between the public's right to order and its interest in the proper care and handling of juveniles.

The preliminary procedures of the California Juvenile Courts Law, civil rather than criminal in nature, provide to a minor accused of a crime a means to escape some of the consequences which would result to an adult offender if in the opinion of the juvenile court the minor is one who would benefit from its application. As applied by California courts, those procedures contain all the essential elements of due process and fundamental fairness required by the Federal Constitution as interpreted by the U.S. Supreme Court, in, among others, Haley v. Ohio, 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224 (1948), Kent v. U.S., 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966), In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) and McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971).

Th distinctions between the preliminary procedures and hearings provided by California law for juveniles

and a criminal trial are many and apparent and the effort of petitioner to relate them is unconvincing. However, even assuming jeopardy attached during the preliminary juvenile proceedings, and further assuming all rights constitutionally assured to an adult accused of crime are to be enforced and made available to a juvenile[3] it is clear that no new jeopardy arose by the juvenile proceeding sending the case to the criminal court. Such transfer neither acquitted nor convicted and could not in any event represent a second trial for the same offense or more than a continuing jeopardy for a single offense.

While there is no doubt that certain formal and technical rules as to when jeopardy attaches or terminates may have their place and serve a valid function in adult criminal proceedings, to apply these same rigid and inflexible standards to a juvenile court could deprive if of its ability to function. In this regard, this Court is in full concurrence with the findings of the U.S. Supreme Court in its most recent examination of the juvenile courts:

> "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it." McKeiver v. Pennsylvania, 403 U.S. 528, at 551, 91 S.Ct. 1876, at 1989 (1971).

The Petition for Writ of Habeas Corpus is denied.

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[3]But see McKeiver v. Pennsylvania, *supra*, at page 533, 91 S.Ct. 1976.

APPENDIX C.

[Crim. No. 19956, Second Dist., Div. Four. May 19, 1971.]

In re GARY J., a Minor, on Habeas Corpus.

KINGSLEY, J.—On February 9, 1971, a petition was filed in the Juvenile Court of Los Angeles County, alleging that the relator herein—Gary J.—was a person described by section 602 of the Welfare and Institutions Code,[1] in that he had committed an act which, if committed by an adult, would constitute a violation of section 211 of the Penal Code (robbery). After a detention hearing, the minor was detained pending a hearing on the petition. A "jurisdictional" hearing, pursuant to section 701,[2] was held on March 1, 1971, resulting in a finding that the allegations of the petition

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[1]Unless otherwise indicated, statutory references are to the Welfare and Institutions Code.

[2]Section 701 of the Welfare and Institutions Code reads as follows: "At the hearing, the court shall first consider only the question whether the minor is a person described by Sections 600, 601, or 602, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may be received in evidence; however, a preponderance of evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Sections 600 or 601. When it appears that the minor has made an extrajudicial admission or confession and denies the same at the hearing, the court may continue the hearing for not to exceed seven days to enable the probation officer to subpoena witnesses to attend the hearing to prove the allegations of the petition. If the minor is not represented by counsel at the hearing, it shall be deemed that objections that could have been made to the evidence were made."

were true and that the minor was a person described by section 602. The proceedings were continued for a dispositional hearing, pursuant to section 702.[3] At that hearing, the court announced its intention to find, pursuant to section 707, that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, and that the court intended, under that section, to dismiss the petition and direct that the minor be prosecuted as an adult in the superior court. After an adjournment sought by the minor's counsel, such an order was made. The present proceeding is designed to test the validity of the order;[4] we conclude that it was validly made and not subject to attack herein.

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[3]Section 702 of the Welfare and Institutions Code read as follows: "After hearing such evidence, the court shall make a finding, noted in the minutes of the court, whether or not the minor is a person described by Sections 600, 601, or 602. If it finds that the minor is not such a person, it shall order that the petition be dismissed and the minor be discharged from any detention or restriction theretofore ordered. If the court finds that the minor is such a person, it shall make and enter its findings and order accordingly and shall then proceed to hear evidence on the question of the proper disposition to be made of the minor. Prior to doing so, it may continue the hearing, if necessary, to receive the social study of the probation officer or to receive other evidence on its own motion or the motion of a parent or guardian for not to exceed 10 judicial days if the minor is detained during such continuance, and if the minor is not detained, it may continue the hearing to a date not later than 30 days after the date of filing of the petition. The court may, for good cause shown continue the hearing for an additional 15 days, if the minor is not detained. The court may make such order for detention of the minor or his release from detention, during the period of the continuance, as is appropriate."

[4]The contentions here made were seasonably raised in the juvenile court proceeding and by way of a petition for habeas corpus in the superior court.

I

It is not here contended that the order was not based on evidence sufficient to support the findings required by section 707. The contentions are:

(1) That, as a matter of statutory construction, the order under section 707 must be made during the pendency of the 701 hearing and that, the 701 hearing having terminated, statutory power to send the juvenile to superior court for a criminal trial had lapsed; and

(2) That, at whatever stage the statute permits an order such as the one herein involved to be made, constitutional rights affording protection against double jeopardy prevent such action at any time after the 701 hearing has begun.

II

(1) We conclude that the statutory scheme was followed in the case at bench. Section 707 reads as follows: "At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, or if, at any time after such hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefor by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to Section 780 or 1737.1, the court may make a finding noted in the

minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the court proceedings resume.

"In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in itself, shall not be sufficient to support a finding that such minor is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"A denial by the person on whose behalf the petition is brought of any or all of the facts or conclusions set forth therein or of any inference to be drawn therefrom is not, of itself, sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"The court shall cause the probation officer to investigate and submit a report on the behavioral patterns of the person being considered for unfitness."

Although sections 701 and 702 clearly contemplate that the determination of wardship, and the determination of treatment shall be separately considered; and, except in cases where the probation officer has anticipated the jurisdictional finding and prepared his social study in advance, that they will be made on different days, still the language of both sections speaks

of "the" hearing and, in section 702, of a continuance of "the" hearing. We conclude that the statute did not intend, nor contemplate, that the 707 consideration should necessarily be part of a 701 hearing.

In fact, the whole philosophy of the present Juvenile Court Law is counter to the interpretation now urged. The purpose of requiring separate consideration of wardship and of disposition was to prevent the court from being affected, at the first stage, by evidence of the minor's character not relevant to determination of his guilt. (*In re Gladys R.* (1970) 1 Cal.3d 855 [83 Cal.Rptr. 671, 464 P.2d 127].) To require or even permit the introduction at the 701 hearing of the kind of data on which a 707 determination is made would violate both the letter and the spirit of the statute.[5]

We are aware of the language in *People v. Brown* (1970) 13 Cal.App.3d 876 [91 Cal.Rptr. 904], which seems to hold that the 707 finding must be made during a 701 hearing and prior to the conclusion of that stage. But that language is dicta; the 707 finding had been made during the 701 hearing; no objection was made to the consideration at that point of the evidence leading to the 707 decision. Under these circumstances, decision as to the point herein involved was not necessary for the decision of the case and, for the reasons above set forth, we are not inclined to follow it.

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[5]Of course, we do not imply that evidence might not properly be offered and received at the 701 hearing which would, in and of itself, show that the minor was not one for whom juvenile court processes were appropriate.

III

(2) We conclude also that the constitutional rights against double jeopardy were not violated by the procedure herein adopted. It is clear that, at the time when the present Juvenile Court Law was under consideration, it was not thought that the concept of double jeopardy, as applied to adults in criminal cases, was applicable to juvenile court proceedings. In fact, the recommendation of the Special Study Commission, which drafted the proposals forming the basis for the 1961 revision, said:

"Recommendation No. 6

"Prohibit minors from being subject to criminal prosecution based on the facts giving rise to a juvenile court petition once final judgment has been made in the juvenile court, except that a finding of unfitness in the juvenile court shall not constitute final judgment in the terms of this recommendation.

"Comments:

"There are several cases on record where juveniles have been tried and sentenced in a criminal court for an offense upon which final judgment was previously made in the juvenile court. Such a course of action, while rare, is unfortunately permissible under the present juvenile court law.

"In an adult case, this is prohibited because it would constitute placing the individual in double jeopardy. The Commission sees no valid reason why juveniles, as well, should not be protected from such proceedings.

"In so recommending, the Commission proposes that the proceeding by which a minor is found unfit for processing in the juvenile court shall not constitute

final judgment in terms of this recommendation. Thus, the information disclosed at the juvenile court hearing in certified cases would be permitted to be considered in the criminal courts."

That recommendation is now embodied in section 606 of the act.

Ten years later, in *Richard M. v. Superior Court* (1971) 4 Cal.3d 370 [93 Cal.Rptr. 752, 482 P.2d 664], the Supreme Court determined that, in view of decisions of the United States Supreme Court which had been rendered after the present Juvenile Court Law was adopted: ". . . [i]n proceedings before the juvenile court juveniles are entitled to constitutional protections against twice being placed in jeopardy for the same offense." The issue before us is whether that proposition operates to bar the kind of disposition of a juvenile case that was made here. We conclude that it does not.

There are three situations in which it could be contended that the constitutional rights had been violated: (a) where, as in *Richard M.*, the minor is, in effect, found not guilty of the offense underlying the section 602 petition; (b) where the minor is made a ward under section 701 and the 702 hearing has resulted in a treatment disposition order under section 725—here both section 606 and the Constitution would prohibit a renewal of the case in another court; (c) the case at bench, where no final disposition order has been made.

In the situation before us, while it is true that, under the language in *Richard M.*, jeopardy had attached once the first witness had testified at the 701 hearing, no *new* jeopardy has arisen by the proceedings sending the case to the criminal court. The entire Juvenile Court Law contemplates a careful determination, on a case-

by-case basis,[6] as to the type of procedure most likely to protect society and to rehabilitate the minor. Under some circumstances, a minor will grow from the criminal court to the juvenile court; in other cases he will go from the juvenile court to the criminal court. But, until one court or the other reaches a final disposition of the case, only a single jeopardy is involved. In *Richard M.*, the Supreme Court impliedly felt this to be true; in recounting the risks which that minor had faced, the court enumerated not only the possibility of a disposition at a 702 hearing but it expressly mentioned the very possibility which has here occurred.[7]

In short we can find neither statutory nor constitutional objections to the order herein attacked. The petition for a writ of habeas corpus is denied.

Files, P. J., and Jefferson, J., concurred.

Petitioner's application for a hearing by the Supreme Court was denied August 4, 1971. Peters, J., was of the opinion that the petition should be granted.

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[6]*Jimmy H. v. Superior Court* (1970) 3 Cal.3d 709 [91 Cal. Rptr. 600, 478 P.2d 32]; *Bruce M. v. Superior Court* (1969) 270 Cal.App.2d 566 [75 Cal.Rptr. 881].

[7]"The minor was exposed to the possibility that an adjudication would be made; that the court might then proceed to the dispositional phase of the bifurcated juvenile court proceedings (§ 702); and that, since an uncontested hearing was anticipated that the Social Report and Recommendations of the Probation Officer were prepared and available (§ 702). The minor was not immune from the possibility that the court would determine that he was not amenable to the programs available to the juvenile court and that it might direct that he be prosecuted under the applicable criminal statute (§ 707)." (*Richard M. v. Superior Court* (1971) 4 Cal.3d 370, 376 [93 Cal.Rptr. 752, 482 P.2d 664].)